

ISSUES

to medical care or temporary total compensation are not subject to review under K.S.A. 44-534a. Respondent asserts that the issue appealed is not whether claimant sustained injury by accident or accidents that arose out of and in the course of her employment but, instead, the issue is which body parts were involved in the accident. In the event the Board considers the merits of the appeal, respondent contends that the record supports the ALJ's finding that claimant is not entitled to medical care for her low back and lower extremity conditions.

The issues for the Board's review are:

- (1) Did the ALJ issue an appealable order?
- (2) If so, does the Board have jurisdiction over this appeal?
- (3) If so, did claimant prove that she suffered injuries to her low back and lower extremities by accident or accidents that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent in the housekeeping department. On January 3, 2008, she spent the 8-hour day bent over cleaning trash cans with soap and water. As a result of that work, she developed pain in her back which she described as starting in her neck and head down to her hips. She told her supervisor about her complaints. She only had 30 minutes left of her shift, so she completed her workday.

The next day, January 4, claimant went to the emergency room. The emergency room records indicate that claimant complained of pain down her spinal column with the onset being the night before. She indicated her primary area of pain was her entire back. She testified when she described her pain to the emergency room personnel as being in her entire back, she meant that she was having pain from the back of her head down to her hips.

After claimant filled out an accident report on January 7, respondent sent her to the Olathe Occupational Medicine Clinic (OOM), where she complained of pain in her back. However, she was treated only for her upper back, neck and shoulders. She testified she did not know why she did not ask for treatment for her low back as well as her upper back. At the time, she had no problems with her feet. The records from OOM indicate only that claimant complained of pain in her upper back. She was diagnosed with a thoracic/trapezius strain, sent to physical therapy, prescribed medication, and put on modified duty. Although OOM's records of January 14 and January 21 indicate that claimant had mild tenderness to palpation over the upper lumbar muscles, her diagnosis and treatment continued to be for her thoracic and trapezius strains.

On February 8, 2008, claimant returned to the emergency room, complaining of a burning sensation in her feet and swollen ankles. She was diagnosed with paresthesia,

possibly the result of a drug reaction to the medicine she had been prescribed. On February 11, claimant was seen by Dr. Charles Smith of OOM. She described her condition as being so bad that she could not walk or stand. Although Dr. Smith thought it was possible that claimant's paresthesia was a reaction to her medication, he also stated that he thought "there is a strong possibility that something else could be going on and that she needs to be evaluated through her personal medical doctor."¹ Dr. Smith continued to treat claimant's upper back and shoulders, but he indicated that claimant's problems with her feet were not work related.

Claimant returned to the emergency room on March 26, 2008, complaining of bilateral foot swelling and numbness, as well as low back pain stemming from housekeeping and constant bending over.

Because Dr. Smith would not treat claimant's foot problems, she went to see her personal physician, Dr. V. Carlos Palmeri. Dr. Palmeri sent claimant for tests, including an MRI of her lumbar spine, which was performed on April 9, 2008. The MRI showed that claimant had degenerative disc bulging and fairly advanced degenerative facet arthropathy at L4-5 with mild acquired canal stenosis. Dr. Palmeri sent claimant to Dr. Paul O'Boynick, who performed a lumbar myelogram on April 22. The myelogram showed significant central spinal stenosis at L4-5. Dr. Paul O'Boynick recommended a posterior lumbar decompressive laminectomy with lumbar discectomy at L4-5. Respondent denied claimant's request for medical treatment.

After a preliminary hearing, the ALJ held:

In this claim for injuries to claimant as school housekeeper in low back, legs and feet from an episode of washing trash cans at school right after New Years were disputed. [sic] But she is receiving treatment for upper back complaints from this same cause. A large amount of testimony and records were present and the matter taken under advisement while her authorized treatment proceeds.²

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

¹ P.H. Trans., Cl. Ex. 1 at 33.

² ALJ Preliminary Decision (May 16, 2008).

³ K.S.A. 2007 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁵ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 2007 Supp. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

⁵*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

The ALJ did not decide the issue of whether claimant's low back and radicular or lower extremity symptoms were due to an accident and injury which arose out of and occurred in the course of her employment with respondent. Instead, the ALJ took that matter "under advisement." The Board is without jurisdiction to review an issue that has not been addressed by the ALJ.

CONCLUSION

The Board is without jurisdiction to decide this matter, which was taken under advisement and not decided by the ALJ.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal of the Order of Administrative Law Judge Robert H. Foerschler dated May 16, 2008, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of August, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Kip A. Kubin, Attorney for Self-Insured Respondent
Marcia Yates-Roberts, Administrative Law Judge

⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2007 Supp. 44-555c(k).